

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

April 8, 1997

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62(1), STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 96-2783-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

RANDY KRUEGER,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Outagamie County: HAROLD V. FROEHLICH, Judge. *Affirmed.*

MYSE, J. Randy Krueger appeals a conviction following a jury trial of operating a motor vehicle while intoxicated, third offense, and operating with a prohibited blood concentration, third offense. Krueger contends that the court erroneously permitted the State to prove that the instant offense was the third offense by introducing a certified copy of his driving record and that the court erroneously submitted the issue of Krueger's prior convictions to the jury as an element of the charged offense. Because this court concludes that the number of prior convictions is an element of the charged offense and that the certified driving record is a proper method of proving Krueger's prior convictions, the judgment of conviction is affirmed.

The facts in this case are undisputed. Randy Krueger was stopped and arrested for operating a motor vehicle while under the influence of an intoxicant and operated with a prohibited blood alcohol concentration. Each of these was charged as the third offense. A blood test taken from Krueger demonstrated an alcohol content level of .23%.

The matter was tried to a jury, which was instructed that among the elements of the offense charged was that Krueger had two prior convictions for operating a motor vehicle while intoxicated and operating with a prohibited blood alcohol concentration. The State introduced a certified copy of Krueger's driving record as proof of these prior convictions. The certified driving record was received in evidence and presented to the jury as part of their deliberations. The jury returned a verdict of guilty on both counts.

The question whether the prior convictions constitute an element of the offense charged presents a question of statutory interpretation. The construction and application of a statute to a set of facts presents a question of law, which we review de novo. *State v. Keith*, 175 Wis.2d 75, 78, 498 N.W.2d 865, 866 (Ct. App. 1993).

The essence of Krueger's contention is that the number of prior convictions is not an element of the offense charged and to demonstrate to the jury the existence of prior convictions is to improperly inflame the passions of the jury so as to preclude a fair and just trial. The problem with each of these contentions, however, is that each has been addressed by Wisconsin courts and determined adversely to Krueger.

Whether the number of prior convictions is an element of the offense charged was considered and determined by the Wisconsin Court of Appeals in *State v. Ludeking*, 195 Wis.2d 132, 536 N.W.2d 392 (Ct. App. 1995). In *Ludeking*, the court of appeals determined that the number of prior convictions was an element of the offense charged. *Id.* at 138, 536 N.W.2d at 394. The court reasoned that the plain language of the statute defines the prohibited blood alcohol concentration based on the number of prior convictions and that, accordingly, the number of prior convictions constitutes an element of the offense. *Id.* at 138-39, 536 N.W.2d at 395.

While Krueger contends that *Ludeking* was wrongly decided, a decision by the court of appeals is binding and must be followed as precedent by all other reviewing courts. *Cook v. Cook*, No. 95-1963, slip op. 23-24 (Wis. March 19, 1997). Accordingly, this court is bound to apply the principles of law enunciated in *Ludeking*, which requires we affirm the trial court's instruction to the jury that the number of prior convictions constitutes an element of the offense charged which must be proved beyond a reasonable doubt to the jury.

Krueger also argues that the filing of a certified driving record is unduly prejudicial and will serve to influence the jury's deliberation so as to deny Krueger a fair and impartial hearing. Krueger's contention involves a question of the admissibility of evidence which involves the trial court's exercise of discretion. See *State v. Pharr*, 115 Wis.2d 334, 342, 340 N.W.2d 498, 501 (1983). Discretionary determinations made in regard to the admission of evidence will be affirmed by a reviewing court as long as there is a reasonable basis for the court's determination. *Id.* In this case, the trial court was following established Wisconsin precedent which provides a reasonable basis for the court's determination.

The admissibility of a certified driving record as proof of prior convictions has also been considered by the court of appeals and has been found to be appropriate. In *State v. Leis*, 134 Wis.2d 441, 445-46, 397 N.W.2d 498, 500-01 (Ct. App. 1986), the introduction of a driving record to prove prior revocation during an operating after revocation prosecution was specifically found to be appropriate. Once again, this court is required to apply the law as set forth in previously published decisions of the appellate courts. *Cook*, slip op. at 23-24. The *Leis* decision controls this issue raised by Krueger on appeal. The trial court, of course, has discretion to redact irrelevant and unfairly prejudicial parts of a defendant's driving record. Krueger makes no contention that the trial court erred in this respect. This court, therefore, concludes that the trial court did not err by receiving the certified driving record as proof of the prior convictions.

Based upon binding precedent the court rejects each of the challenges mounted to Krueger's conviction. The judgment of conviction is therefore affirmed.

By the Court. – Judgment affirmed.

This opinion will not be published. RULE 809.23(1)(b)4, STATS.